



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

October 30, 1997

Mr. Scott A. Durfee  
General Counsel  
Office of the District Attorney  
Harris County  
201 Fannin, Suite 200  
Houston, Texas 77002-1901

OR97-2409

Dear Mr. Durfee:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 109132.

The Harris County District Attorney's Office (the "district attorney") received a request "for full disclosure and release of all records," regarding the "guidelines used, and final analysis used to process and deliver a decision to a [sic] agreement by the prosecution and the defense to enter a plea of not guilty by reason of insanity of Gary Paul Sutherland, as well as profile, voting methods and the final of voting on said person." You have submitted the information which you contend is responsive to the request. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.108 of the Government Code.<sup>1</sup> We have considered the applicable exceptions you claim and reviewed the submitted information.

The Seventy-fifth Legislature amended section 552.108 of the Government Code to read as follows:

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<sup>1</sup>We note that, although you raised sections 552.101, 552.103 and 552.107, as you did not explain how these exceptions apply to the requested information, we do not consider them. See Gov't Code § 552.301(b)(1); Open Records Decision No. 363 (1983). The Open Records Act places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974).

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of 552.021 if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

....

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

See Gov't Code § 552.108. You assert that the requestor seeks information related to the district attorney's investigation and prosecution connected with the case of *State v. Sutherland*, Cause No. 728316, in the 262nd District Court, Harris County, Texas. In your original letter to this office requesting a ruling, you further assert that "[b]ecause this request seeks information into the thought processes of the district attorney's office with respect to the insanity defense posed by the defendant, this request seeks the work product of this office." We note that because the Legislature has amended section 552.108, effective September 1, 1997, this office requested additional briefing on your claimed exception to disclosure. See Act of June 1, 1997, H.B. 951 § 1, 75<sup>th</sup> Leg., R.S. (to be codified at Gov't Code § 552.108). In response to our request for additional information, you stated that the requested records relate to an "investigation that did not result in conviction or deferred adjudication."

Section 552.108(a)(2) provides that information is excepted from disclosure if "it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication." The records submitted deal with the detection and investigation of a possible crime, but because

the completed investigation did not result in a conviction or deferred adjudication, the information may be withheld from disclosure pursuant to section 552.108(a)(2). We conclude that the district attorney's office has shown the applicability of section 552.108(a)(2) to most of the submitted information. However, we note that within the documents submitted to this office for review are documents filed with the court. Records which are part of the public record cannot be withheld under section 552.108. *Cf. Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57-58 (Tex. 1992). We also note that you may choose to release all or part of the information that is not otherwise confidential by law.<sup>2</sup> Gov't Code § 552.007.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Sam Haddad", written over a horizontal line.

Sam Haddad

Assistant Attorney General  
Open Records Division

SH/rho

Ref.: ID# 109132

Enclosures: Submitted documents

cc: Ms. Ann M. Fusilier  
12826 Lima Drive  
Houston, Texas 77099  
(w/o enclosures)

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<sup>2</sup>Some of the documents submitted to this office are medical or psychiatric records that were created or are being maintained by physicians. Section 611.002 of the Health and Safety Code, which pertains specifically to mental health patients, applies to "[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional." *See also*, Health and Safety Code § 611.001 (defining "patient" and "professional"). These documents may be confidential and must be released only in accordance with the Medical Practice Act, ("MPA"), V.T.C.S. article 4495b, the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. § 12101 *et seq.*, or other applicable statutes. Open Records Decision No. 598 (1991).